UNACCEPTABLE LICENSE TERMS

Recently, we have noticed a spate of licenses which include terms that the government is unable to accept. At first, this problem was seen in software licenses but lately it has spread into online subscriptions. There appear to be several reasons for this. One is the draft UCITA code which would effectively make little sovereigns out of software manufactures, a subject we do not currently have time or space to explore. There is also the fact that these licenses are generally for such a relatively small amount of money that they are never subject to legal review. In fact, there is a danger that procurement personnel will not be aware of licenses because they will have been signed by the requisitioners. Finally, there may in some instances be a perception that since there is an emphasis on commercial contracting, we are obligated to accept whatever marketplace terms are presented.

Presented below are some of the most common objectionable terms.

Merger Clauses These are usually found at the end of the license and are both the most common problem and the crux of all other problems with licenses. Typically, such a clause will say something to the effect that the license represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter. The obvious problem is that when dealing with the Government, the license is *not* the complete and final agreement of the parties. With the exception of credit card buys (dealt with below) there is always going to be a contract or purchase order which will have some mandatory clauses. This is sometimes a shock to the vendor, who professes ignorance of the existence of any such contract. Most of the time, some of these clauses will contradict license provisions.

Applicable Law Just before you get to the merger clause, you will likely find a clause stating that the agreement will be construed according to the laws of [state.] (The really nasty ones will say something like "This license shall be construed under the law of the Republic of Eire and any action concerning this license must be brought in Irish courts." The idea being to effectively foreclose any redress on part of the buyer.) Since this is a federal contract, we must change this language to reflect that it will be controlled by federal law as implemented by the FAR and its supplements.

Disputes Aside from the question of where to bring disputes and the law under which they will be governed, the most common problem is the contractor's reservation of a right to self-help; that is, to terminate the service unilaterally if he believes we are in breach. The contractor's actual recourse is found in the Disputes Clause, FAR 52.233-1, incorporated in contracts for commercial items by way of 52-212-4.

One contractor's attorney recently argued that the Disputes clause usually deals with monetary disputes and so should have no application if, for example, the contractor believes we are misusing proprietary information. The clause makes it clear that this interpretation is incorrect in that it deals with "*any* (emphasis added) request for equitable adjustment, claim, appeal, or action arising out of or relating to this contract."

Furthermore, the "contractor shall proceed diligently with performance pending final resolution of the dispute."

Credit Card Buys When we are purchasing goods or services with a credit card, we cannot fall back on mandatory clauses because the contractor does not sign up to any clauses. Nonetheless, the Contract Disputes Act (41 USC 602) applies to all contracts, express or implied, for the procurement of property or services. For this reason, one view of this situation would be that you should always use a purchase order rather than a credit card if there is a license attached. At the very least, impermissible terms must be deleted.

And so forth Although the above are the most common problems, each license may have its own individual quirks. One license with several option periods has language which allows the contractor to unilaterally alter terms and conditions. Obviously, in that case there is no option. Another, in an otherwise unobjectionable *Force Majeure* clause, absolved the contractor for responsibility for any hardware or software errors. Yet if there are errors in his hardware or software they are hardly beyond his control.

Conclusion The important thing for the us is not to let these issues slide beneath our radar just because they tend to be of relatively low dollar value. The important thing for contractors is to realize that these objections to their terms are not discretionary on our part, but are mandated by federal law.

Robert R. Chase
(301) 394-1599
rrchase@arl.army.mil